

NOT FOR PUBLICATION**FILED**

UNITED STATES COURT OF APPEALS

MAY 26 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NORTH COUNTY COMMUNICATIONS
CORPORATION, a California corporation,

Plaintiff-counter-defendant-
Appellant,

v.

SPRINT COMMUNICATIONS
COMPANY, L.P., a Delaware limited
partnership,

Defendant-counter-claimant-
Appellee.

No. 15-56678

D.C. No.
3:09-cv-02685-CAB-JLB

MEMORANDUM*

NORTH COUNTY COMMUNICATIONS
CORPORATION, a California corporation,

Plaintiff-counter- defendant-
Appellee,

v.

SPRINT COMMUNICATIONS
COMPANY, L.P., a Delaware limited
partnership,

Defendant-counter-claimant-
Appellant.

No. 15-56722

D.C. No.
3:09-cv-02685-CAB-JLB

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Southern District of California
Cathy Ann Bencivengo, District Judge, Presiding

Argued and Submitted May 8, 2017
Pasadena, California

Before: CLIFTON and FRIEDLAND, Circuit Judges, and RICE,** Chief District Judge.

North County Communications (NCC) and Sprint both appeal the district court's order resolving their contract dispute in favor of Sprint but holding that Sprint had no recoverable damages within the applicable statute of limitations.

The parties' relationship was governed by their 2002 Settlement and Switched Access Service Agreement ("the Agreement"). We review de novo a district court's interpretation of a contract. *United States v. 1.377 Acres of Land*, 352 F.3d 1259, 1264 (9th Cir. 2003). If its interpretation is based on extrinsic evidence, however, then we review any related factual determinations for clear error and the application of law de novo. *See id.* (citing *Tamen v. Alhambra World Inv., Inc. (In re Tamen)*, 22 F.3d 199, 203 (9th Cir. 1994)).

The Agreement was premised on NCC's provision of local exchange service. Because the FCC's interpretation and application of the Communications

** The Honorable Thomas O. Rice, Chief United States District Judge for the Eastern District of Washington, sitting by designation.

Act of 1934 was incorporated into the Agreement, the district court looked to the Act's definition of "telephone exchange service" to determine whether NCC provided local exchange service. We agree with this approach.

Based on its examination of a substantial amount of evidence, the district court held that HFT, the only entity to which NCC terminated calls, was not a *bona fide* subscriber of local exchange services and that NCC therefore had not provided local exchange services as required by the Agreement. Specifically, the court found that "the whole payment arrangement between NCC and HFT is a sham business deal designed to create the illusion of a *bona fide* carrier-customer relationship in compliance with . . . its contractual obligation with Sprint." It further found that "NCC made a wilfully false attempt to demonstrate a business arrangement with HFT," including by generating "false and misleading documents" and "false discovery responses." These findings of fact were not clearly erroneous. Applying the Agreement—as informed by the Communications Act and the FCC's interpretation thereof—to these facts, we also conclude that NCC did not provide local exchange services. We thus affirm the district court's conclusion that NCC's breach of contract claim fails and Sprint's breach of contract counterclaim succeeds.

The parties dispute the applicable statute of limitations for Sprint's counterclaim. We conclude that the district court should have applied California

law's four-year statute of limitations rather than the Communications Act's two-year statute of limitations. Although the Agreement provides that it is "expressly subject to the Communications Act," it also states that "California law governs all substantive matters pertaining to the interpretation and enforcement of the terms of this Agreement." Because all the claims and counterclaims that were tried in this case arose under state law, the district court should have applied the state's statute of limitations to those claims, especially given the parties' clear intent that state law govern the enforcement of the Agreement.

Finally, Sprint argued, citing *Chavez v. City of Hayward*, No. 14-cv-00470-DMR, 2015 WL 3562166, at *4 (N.D. Cal. June 8, 2015), that the district court erred by calculating the limitations period for Sprint's counterclaim from the date it filed its answer rather than the date that NCC filed the complaint. *See also Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 389 (4th Cir. 1982) ("[T]he better view holds that 'the institution of plaintiff's suit tolls or suspends the running of the statute of limitations governing a compulsory counterclaim.'" (quoting 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1419, at 109 (1971) (footnote omitted))); *Trindade v. Super. Ct.*, 106 Cal. Rptr. 48, 49-50 (Ct. App. 1973). NCC has not disputed that the district court erred in this regard. *See Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009). We thus reverse the district court's application of the statute of limitations and remand for it to

calculate the limitations period based on the date of the filing of the complaint.

Accordingly, we **AFFIRM IN PART, REVERSE IN PART**, and **REMAND** for the district court to apply the California law limitations period, calculated based on the filing of the complaint. Costs are awarded to Sprint.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit**BILL OF COSTS**

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Opening Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Answering Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Reply Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Other**	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
TOTAL:				\$ <input type="text"/>	TOTAL: \$ <input type="text"/>			

* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By:

, Deputy Clerk